Filed 12/21/12 Bass v. Civil Service Bd. of the City of Fresno CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JAMES BASS,

Plaintiff and Appellant,

v.

CIVIL SERVICE BOARD OF THE CITY OF FRESNO et al.,

Defendants and Respondents.

F063831

(Super. Ct. No. 10CECG02031)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Debra J. Kazanjian, Judge.

Robert J. Rosati for Plaintiff and Appellant.

Tuttle & McCloskey, Daniel T. McCloskey and James F. McBrearty for Defendant and Respondent Civil Service Board of the City of Fresno.

Betts & Rubin, James B. Betts and Joseph D. Rubin for Defendant and Respondent City of Fresno.

-ooOoo-

James Bass appeals from a judgment denying his petition for writ of administrative mandate. The petition sought review of a decision of respondent Civil Service Board of the City of Fresno (the board), upholding an order of removal from employment issued by respondent City of Fresno (the city). Appellant contends the trial court's findings in the mandate proceeding were not supported by substantial evidence. He also contends the board's termination of his employment was an abuse of discretion. Finally, he contends the administrative proceedings deprived him of due process because he did not receive a pretermination hearing before a neutral decisionmaker, there was an unacceptable probability that the board was biased against him, and the board did not employ the constitutionally required standard of proof. None of these contentions has merit; we affirm the judgment.

Facts and Procedural History

On July 21, 2009, Vanroe Moniz was waiting at a bus stop. He saw appellant's bus parked down the street and saw appellant washing the bus windows. When appellant drove his bus to the bus stop, Moniz boarded the bus and began complaining that appellant was behind schedule and would make Moniz late for a connection. Appellant responded, "You'll live." Moniz took the front seat in the bus and continued to castigate appellant for being late. Eventually, appellant said, "You need to calm down, old boy." (Moniz testified he was 65 years of age at the time of the incident.) The men continued arguing. Moniz stood and stepped down into the well by the front door of the bus and told appellant to open the door. Appellant rose from his driver's seat and stood in the aisle as he told Moniz he must use the rear door to exit the bus. (Appellant testified he had been instructed to eject unruly passengers through the rear door so the passenger could not assault the driver on the way out of the bus.) Moniz walked to the back door as the two men continued to argue. Moniz continued to demand the back door be opened,

and then he walked forward in the aisle.[1] Appellant told him, "I will defend myself. Get out of my face." Moniz continued to demand the back door be opened. Appellant attempted to call his supervisor. As Moniz returned to the front of the bus, appellant said, "Out of my face, sir, don't come up here." While continuing to demand appellant open the door, Moniz stopped a few steps from appellant. Appellant took three steps toward Moniz, who began retreating backwards, and used two hands to shove Moniz in the chest. Moniz fell to the floor of the bus. Moniz took a seat opposite the rear door and the men continued arguing. While standing by the driver's seat, appellant called for assistance from a supervisor and from the police. Officers soon reached the scene and escorted Moniz from the bus. After interviewing both men, the officers made no arrests.

The city served appellant with an eight-page "Notice of Proposed Removal," dated September 1, 2009, and signed by Kenneth Hamm, the city's director of transportation. The notice charged appellant with violation of Fresno Municipal Code section 3-286(a), misconduct and malfeasance, defined in section 3-286(b) as conduct unbecoming an employee of the city and dishonesty in the investigation of the Moniz incident. The notice contained a detailed account of the incident, based on information from the police and from investigations by transportation supervisors, and advised appellant that he could respond orally or in writing to the charges within seven days of the notice. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 (*Skelly*).) Appellant took the opportunity to present an oral response, although he objected to the fact that this pretermination meeting was conducted by Hamm, who had made the initial determination to discharge appellant. After that meeting, Hamm notified appellant that "the Removal is being

---

[1] Appellant testified he tried repeatedly to open the rear door, but that a software problem prevented the door from opening. A fellow driver testified that there were "plenty" of problems with the rear door on the buses. Moniz contended appellant did not try to open the door and that, from the beginning, appellant was trying to hold him on the bus until police arrived.

upheld." Hamm issued an "Order of Removal" on September 18, 2009. On September 21, 2009, appellant filed an appeal to the board, contending that he acted reasonably and in self-defense, and that termination of employment was an excessive penalty compared to discipline imposed on other drivers.

The board conducted a hearing on the appeal on November 13, 2009, and January 22, 2010. After the close of evidence and argument by counsel, the board met in executive session to discuss the charges. In open session, the board voted to sustain the charges against appellant and to uphold termination of appellant's employment. The board issued a formal written order to the same effect on April 1, 2010.

On June 9, 2010, appellant filed a unified petition for writ of administrative mandate and complaint for violation of federal civil rights, naming the city and the board as defendants. They removed the action to federal court, but by stipulation the parties agreed to remand of the writ petition (and stay the civil rights action). After appellant and the city filed pretrial briefs and requests for findings, the writ petition was heard by the court based on the administrative record. In a subsequent written statement of decision, the court denied the petition. It made findings of fact concerning the matters specified in the requests for findings. Based on its findings, the court concluded the evidence supported the board's finding of misconduct; the court also concluded termination of appellant's employment "was not excessive under the circumstances." Judgment was entered accordingly and appellant filed a timely notice of appeal.

Discussion

I.

At the beginning of the administrative hearing, appellant raised "two preliminary procedural issues." One of these issues involved appellant's contention that, because the charging document contained charges that amounted to criminal conduct by appellant, he was entitled to application by the board of a clear and convincing standard of proof instead of the preponderance of the evidence standard. The board went into executive

session to consider the preliminary issues. In discussing the burden of proof question, the board's legal advisor said that the problem could be avoided by applying the preponderance of evidence standard, and then, if quality of the evidence presented by the city supported such a conclusion, the board could note that the evidence supported the findings under the clear and convincing standard. The legal advisor said, "Hopefully [the city attorney] has that kind of evidence." The chair of the board said, "Well, we'll hope so." She noted that the evidence in an earlier hearing that morning had met the clear and convincing standard. A speaker, indentified in the transcript only as "Voice" stated that he could have told appellant's counsel "when he first came in here that this [is] not the Supreme Court of the United States … and is not the Constitution." "Voice" added: "(O)ur rules are governed by the City of Fresno charter." The chair, apparently seeking to correct this view, stated that the board has its own rules, "which [are] actually what governs our [standards of proof]." The "voice" added, "The Supreme Court can do what they want."

Appellant contends this discussion in executive session constitutes evidence of bias against appellant and prejudgment of his claims in the administrative hearing. As stated in appellant's opening brief on appeal: "Even before the Board members heard one second of testimony, they were discussing how to write an opinion in favor of the City to minimize the risk that it would be overturned by a court and their legal advisor expressed his unabashed hope that the City attorney had clear and convincing evidence; they expressed their disdain for the rule of law: 'The Supreme Court can do what they want.'"

All parties agree[2] that appellant has the burden to establish """an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over [his] claims."""" (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.)

---

[2] The city and the board have filed separate respondent's briefs.

We have reviewed the transcript of the executive session, to the extent that portion of the hearing is included in the reporter's transcript in the administrative record. No fair reading of the transcript supports a conclusion that the board, or any member of it, was biased or had prejudged the case. Instead, the transcript shows that two unobjectionable claims were made, one by the board chair and one by an unidentified person whom we will assume, for present purposes, to have been a board member. The board chair merely expressed a hope that the board could avoid the possibility of judicial reversal of the board's decision by stating, in the alternative, that the board found any evidence presented by the city to meet the clear and convincing standard. The chair's statement did not express a hope that the city would prevail at the hearing but, rather, that if the city prevailed, its evidence would be strong enough to permit the board to make a prophylactic finding on the burden of proof. The chair's statement clearly indicated a willingness to judge the evidence for what it was. The unidentified board member's statement also fails to show a probability of bias. Instead, the board member correctly stated that he or she felt an obligation to follow the rules of the board, until and unless a court instructed the board to apply different rules. A commitment to following the rules of the administrative body does not constitute "disdain for the rule of law," as appellant contends. Finally, it may be noted that an administrative decisionmaker's interest in constructing its decision to avoid judicial reversal does not imply prejudgment of the facts, as appellant contends; instead, such a determination by the decisionmaker merely reflects a commitment not to unnecessarily waste agency time on a second hearing if the evidence clearly meets a standard of proof proposed by one of the parties.

Appellant contends that the board "compounded its misconduct"—that is, the bias and prejudgment appellant contends he has shown—by permitting the city to introduce, over appellant's objection, evidence of a prior disciplinary incident. In both administrative and judicial proceedings, however, the Supreme Court has made it clear that rulings adverse to a party do not constitute evidence that the decisionmaker is biased

against a party. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1112 [judicial rulings], citing *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 795-796 [administrative law].) This is particularly true in the case of ordinary evidentiary rulings, which are subject to appellate review. (*People v. Guerra, supra,* at p. 1112.) Appellant has not established a probability of actual bias on the part of the board or any of its members.[3]

II.

On appeal from a trial court's denial of a petition for writ of administrative mandate, we review findings of fact under the substantial evidence test. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1440.) Appellant contends several of the trial court's findings of fact are not supported by substantial evidence. While we partially agree in two narrow instances, we conclude substantial evidence clearly supports the court's decision. (*Kuhn v. Dept. of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Appellant contends there was no substantial evidence to support the finding that Moniz "did not physically threaten [appellant] with harm." While Moniz raised his fist at appellant, he did so as part of haranguing appellant from the rear of the bus. It is clear from the recording of the incident that Moniz had stopped approaching the front of the bus when appellant lunged at him and pushed him to the floor. This constitutes

---

3 Intermixed with appellant's argument that the erroneous evidentiary ruling was evidence of bias is appellant's argument that the ruling was erroneous. The ruling involved the admissibility for limited purposes of evidence of past discipline imposed on appellant. We agree with the trial court that the ruling, even if erroneous, was not prejudicial, since the facts of appellant's present misconduct were clear. In the unusual circumstances of this case, where all of the significant events were captured on an audio/visual recording, we disagree with appellant that this case "turned on the issue of credibility."

substantial evidence that, during the time when appellant assaulted Moniz, Moniz did not present a physical threat to appellant.

The trial court found appellant "intentionally refused to open the back door to let the passenger out and … there was no evidence the back doors had malfunctioned." The evidence was clear that the back door did not open. There was no direct evidence, however, that appellant intentionally refused to open the back door. The evidence establishes that appellant was unable to open the doors, but it does not answer the question whether that was due to error on appellant's part (for example, because he was too agitated to operate the controls correctly[4]), or was due to a malfunction in the interlock mechanism (which, according to witnesses, could have re-set when the bus was started again, leaving no indication of the past malfunction). While there is arguably no basis for concluding that the weight of the evidence resolves this question in favor of imputing intent to appellant in failing to open the rear door, this isolated finding is irrelevant to the court's (and the board's) ultimate conclusion that appellant used unnecessary force with Moniz and that he failed to handle the situation in accordance with the requirements of his job.

Appellant contends there was no substantial evidence he "threatened to knock Moniz to the ground within two minutes of Moniz boarding the bus," as found by the trial court. The transcript of the audio recording clearly discloses, however, that within two minutes after Moniz boarded the bus, appellant said to him, "I will defend myself. Get out of my face." This followed an exchange in which appellant's tone and demeanor prompted Moniz to say to him, "Go ahead and hit me and see what happens to you." Moniz testified his own comment was preceded by appellant "threaten[ing] to hit me."

---

4 Appellant testified that in order for the rear door to be opened, the driver must have his foot fully depressed on the brake and then move the handle back one click. When he was asked why the rear door didn't open, he answered "[b]ecause I was in such a hurry to get to my feet."

While watching the video during the hearing, Moniz stated: "In the video [appellant] says right there, I'm going to hit you if you don't get out of my face …." The reporter's transcript, although noting that passages of the audio/video recording are "inaudible," does not contain an explicit threat by appellant at this point. Moniz's testimony is substantial evidence that appellant threatened some form of physical violence against Moniz. In addition, appellant's statement that he would defend himself, immediately followed by his lunge at Moniz to shove him to the floor, is tantamount to a threat of such violence sufficient to support the trial court's overall findings.

Appellant contends the trial court had no substantial evidence to conclude appellant was the aggressor. The court's complete finding was: "[Appellant] was the aggressor when he advanced toward Moniz and shoved Moniz to the ground while Moniz was retreating and walking backwards." This conclusion is directly supported by the video. Appellant's contention that he was not the "aggressor" if he reasonably felt threatened with assault by Moniz misses the point: the trial court determined, just as a jury might in deciding a self-defense claim, that, weighing the evidence, appellant was not acting under a reasonable fear of assault when he charged at Moniz and pushed him to the ground. Resolving contested factual claims on conflicting evidence is uniquely the province of the trial court (see, e.g., *People v. Tully* (2012) 54 Cal.4th 952, 994), and the court's interpretation of the events clearly was supported by the evidence, including the recording. Similarly, there was ample evidence to support the court's other, related findings that appellant was the aggressor.[5]

The trial court examined the evidence concerning the city's training of bus drivers and concluded "there is no evidence before the court to show that [the city] trained or

---

[5] Appellant's citation to cases and jury instructions concerning self-defense and reasonable fear are not germane: neither the board nor the trial court ruled that appellant could not assert these justifications for his actions; both merely concluded that the credible evidence did not support appellant's claim.

instructed [appellant] to use the level of force that he used against Moniz under the conditions and circumstances that he faced during his interaction with Moniz." Appellant sets forth evidence in the record concerning the training of bus drivers; however, this evidence only shows how a driver is permitted to act if, in appellant's phrase, "he was threatened by an aggressor coming at him with a raised fist." The trial court merely concluded, on substantial evidence, that Moniz was *not* threatening appellant when appellant lunged at Moniz. Accordingly, evidence concerning training under other circumstances (i.e., when a driver is under, or reasonably fears, assault) is not relevant to the training appellant "faced during his interaction with Moniz."[6] Substantial evidence supports the court's finding, as well as the court's numerous subsidiary findings that flowed from this conclusion.

III.

Appellant contends that, even if there were factual grounds for the imposition of discipline, termination of employment was an abuse of discretion by the board. We review the board's decision de novo (that is, we do not defer to the trial court's determination on this issue), but we review the board's decision only for abuse of discretion. "'[N]either a trial court nor an appellate court is free to substitute its own discretion as to the [penalty imposed]; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. [Citation.] Such interference … will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion.'" (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966; see also *Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 74.)

---

6 Further, the evidence is undisputed that appellant subsequently threatened Moniz that "[n]ext time you get up it will be worse," at a time when Moniz was seated far to the rear of the bus and clearly posed no danger to appellant.

Appellant's contention is based entirely upon his own resolution of the conflicting evidence in this case. Thus, he contends he "did exactly what [the city] trained him to do. It is absurd to fire him for following the instructions he was given." The board, as discussed above, reached an entirely different resolution on the conflicting evidence, a resolution found by the trial court to be supported by the weight of the evidence. Under this view of the evidence (which, we note, is entirely supported by the audio/visual recording), appellant's conduct exacerbated the conflict between himself and his passenger, and that interaction culminated with appellant lunging at the passenger and shoving him to the floor of the bus. Under those circumstances, termination of appellant's employment clearly was reasonable. (*Kazensky v. City of Merced*, *supra*, at p. 74.)

IV.

Appellant contends the board was required by constitutional concepts of due process to impose upon the city the burden of proving appellant's misconduct by clear and convincing evidence. He arrives at this conclusion by analysis of United States Supreme Court cases requiring this standard of proof for permanent removal of children from their parents and for cases seeking indefinite commitment to a state mental hospital. (See *Santosky v. Kramer* (1982) 455 U.S. 745; *Addington v. Texas* (1979) 441 U.S. 418.)

The law is well established in California that the correct burden of proof in matters concerning termination of government employment is the preponderance of evidence standard. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153; *Steen v. City of Los Angeles* (1948) 31 Cal.2d 542, 547.) Appellant cites no California case applying the higher standard of proof in a governmental employment case. Although the California Supreme Court has not discussed the standard of proof issue in the terms presented by appellant, we note that the court's last statement on the issue in *California Correctional Peace Officers Assn.*, *supra*, at page 1153, occurred in 1995, more than a decade after the analysis in the *Santosky*

opinion in 1982. (See *Santosky v. Kramer*, *supra*, 455 U.S. 745.) In that case, the court expressly stated: "[T]he appointing power bears the burden of proof by a preponderance of evidence that the employee engaged in the conduct on which the disciplinary charge is based." (*California Correctional Peace Officers Assn.*, *supra*, at p. 1153.)

Even if we were permitted to reexamine this issue under *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455, which we are not, we would not do so in light of general rules of stare decisis (see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 521, pp. 588-589), particularly in a case in which the audio/visual recording constitutes clear and convincing evidence of the significant factual questions, if that standard were deemed applicable.

V.

Appellant's final contention is that, even if there was no reversible error in the termination of his employment, he was deprived of due process during the period between his initial notification of the proposed termination and the board's decision making that termination final. He contends that under *Skelly*, *supra*, 15 Cal.3d at page 215, he was entitled to a preliminary review of the termination decision by someone "reasonably impartial." Instead, he says, his only opportunity for preliminary review was before the same supervisor who made the decision to terminate his employment.

Skelly does not require an initial hearing before an impartial decisionmaker. Instead, it requires that the employee have an opportunity "to respond, either orally or in writing, to *the authority initially imposing discipline*." (*Skelly, supra,* 15 Cal.3d at p. 215, italics added.) As explained in *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 281-283, there is no authority that prohibits the initial decisionmaker from conducting the initial review of an employee's response to charges. The actual penalty of discharge was not imposed after that initial review, but

only after a full hearing before the board. (See *id*. at p. 283.)[7] "[A]ll the process that is due is provided by a pretermination opportunity to respond [to the allegations of misconduct], coupled with post-termination administrative procedures" before a neutral decisionmaker. (*Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532, 547-548.) Accordingly, we conclude the city's procedure providing for a full hearing before the board, at the employee's request, prior to finality of the termination of employment fully satisfies the due process requirements of *Skelly, supra,* 15 Cal.3d at page 215.

Disposition

The judgment is affirmed. Respondents are awarded costs on appeal.

_____
Kane, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Gomes, J.

---

[7] In cases such as *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 631, upon which appellant relies, the employee was deprived of any hearing—pretermination or post-termination—before a neutral factfinder. Accordingly, such cases are not germane to the issues before us.